Petition

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ALEXANDER L. STEVAS

No. 81-502

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

DAVID BUSH,

Petitioner,

vs.

CUMBERLAND ENGINEERING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

1. Does the exclusion from consideration of an affidavit, submitted by a litigant in a civil matter which may be in conflict with prior deposition responses, in which the trial court thus determines that there is no genuine issue as to a material fact and grants summary judgment against litigant result in violation of due process and equal protection provided by the Fifth and Fourteenth Amendments to the Constitution of the United States, if .itigant is not permitted to clarify conflicting statements?

2. Does the refusal of a trial court to allow a litigant in a civil matter to present facts at an evidentiary hearing on a motion to vacate summary judgment thereby disallowing litigant right

to have a jury or trier of facts resolve a disputed factual issue bearing significantly on the outcome of litigation violate litigant's right of fundamental due process and equal protection as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States?

INDEX

		Page
1.	Questions Presented for Review	i
2.	Index	iii
3.	Authorities	v
4.	Opinions Below	1
5.	Jurisdiction	2
6.	Constitutional Provisions, Statutes and Rules	3
7.	A. Statement of the Case ..	4
	B. How a Federal Question Arose	8
8.	Argument	9
9.	Conclusion	25

Appendix A
Order of Supreme Court of Ohio Denying Cert 1a

Appendix B
Order of Supreme Court of Ohio Denying Rehearing 2a

Appendix C
Opinion of Court of Appeals 3a

Appendix D
Fifth Amendment, U.S. Constitution 10a

Appendix E
Fourteenth Amendment, U.S. Constitution 11a

Appendix F
Article I, Sec. 2, Ohio Constitution 12a

Appendix G
Article II, Sec. 26, Ohio Constitution 13a

Appendix H
Article I, Sec. 16, Ohio Constitution 14a

Appendix I
Civil Rule 56 (A), (B), (C), (E), Ohio Rules of Civil Procedure 15a

Appendix J
Civil Rule 60(B), Ohio Rules of Civil Procedure .. 17a

AUTHORITIES

CASES:

Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E. 2d 469 (1974).... 10

American Surety Co. v. Baldwin, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231 (1932) 21

Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)..... 21

Camerlin v. New York Central Railroad Co., 199 F. 2d 698 (1st Cir., 1952)..... 18

Duke v. Sanymetal Products Co., 31 Ohio App. 2d 78, 286 N.E. 2d 324 (1972)..... 16

First National Bank v. Cities Service, 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)..... 12

Griffeth v. Utah Power and Light Co., 226 F. 2d 661 (9th Cir., 1955)... 16

Lindsey v. Normet, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)..... 21

Perma Research and Development Co. v. The Singer Co., 410 F. 2d 572 (2nd Cir., 1969)..... 18

Petroff v. Commercial Motor Freight, Inc., 12 Ohio Op. 2d 484, 82 Ohio L. Abs. 433, 165 N.E. 2d 840 (1960)..... 11

Poller v. Columbia Broadcasting, 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)..... 12

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S. Ct. 724, 88 L. Ed. 967 (1944)..... 11, 16, 23

United States v. Diebold, 369 U.S. 654, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)..... 13

Wilson v. Pollet, 416 P. 2d 381 (1966)..... 17

MISCELLANEOUS:

6 Pt. 2 Moore's Federal Practice, Par. 56.22[1], at 1326 (2d ed. 1979)..... 18

73 Am. Jur. 2d, Summary Judgment, Section 1 at 722 (1974)..... 10

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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT FOR
THE STATE OF OHIO

The Petitioner David Bush respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court for the State of Ohio in this proceeding.

OPINIONS BELOW

No opinion was rendered by the Supreme Court for the State of Ohio.

The Order of the Supreme Court of Ohio overruling a Motion for an Order Directing the Court of Appeals for Hamilton County to Certify its Record is included herein as Appendix A and the Order denying a Rehearing by the same Court is included herein as Appendix B. The opinion of the First District Court of Appeals for the State of Ohio appears herein as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 18, 1981. A timely petition for rehearing was denied by the Supreme Court of Ohio on April 15, 1981. An application for extension of time for filing a petition for writ of certiorari from July 14, 1981 to September 12, 1981 was filed in the Supreme Court of the United States on July 2, 1981. An order granting such application was entered July 2, 1981 in the Supreme Court of the United States granting an extension of time for filing a petition for writ of certiorari in the herein cause to and including September 12, 1981. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following are relied upon in the herein Petition:

1. The Fifth Amendment of the Constitution of the United States, included as Appendix D.

2. The Fourteenth Amendment of the Constitution of the United States, included as Appendix E.

3. Article I, Sec. 2, Constitution of the State of Ohio, included as Appendix F.

4. Article II, Sec. 26, Constitution of the State of Ohio, included as Appendix G.

5. Article I, Sec 16, Constitution of the State of Ohio, included as Appendix H.

6. Civil Rule 56(A), (B), (C), (E), Ohio Rules of Civil Procedure, included as Appendix I.

7. Civil Rule 60(B), Ohio Rules of Civil Procedure, included as Appendix J.

STATEMENT OF THE CASE

Petitioner initiated a claim for civil damages in the Court of Common Pleas of Hamilton County, Ohio, for recovery for personal injuries sustained while injured during the course and scope of his employment for Monsanto Chemical Company. The injury occurred while petitioner was working on a machine manufactured by respondent, Cumberland Engineering (referred to incorrectly as Cumberlin Engineering below). During the litigation of the matter at issue, the Trial Court granted the respondent summary judgment. Petitioner then filed a Motion to Vacate the Judgment which was overruled by the Trial Court. Subsequently, following additional discovery, petitioner filed a second Motion to Vacate under Ohio Civil Rule 60 supported by petitioner's affidavit.

Respondent then filed a Motion to Strike petitioner's affidavit and attachment thereto. The Trial Court permitted oral argument of counsel in chambers and then at the request of petitioner's counsel, in open court. The Court refused counsel's request to have petitioner testify at said hearing even though petitioner was present in Court. The Court subsequently denied petitioner's Motion to Vacate at the conclusion of said oral argument. From that decision of the lower Court, an appeal was taken to the First District Court of Appeals which upheld the decision of the lower Court. From that decision of the Court of Appeals, an appeal was taken to the Supreme Court of Ohio which denied a Motion to Certify the Record and subsequently denied a Motion for Rehearing of the same.

Petitioner contended, through his trial counsel, in his appeal to the Court of Appeals for Hamilton County, that the Trial Court abused its discretion in denying his Motion to Vacate. Petitioner's retained counsel on appeal to the Supreme Court of Ohio argued that the Trial Court was required to hold an evidentiary hearing to resolve factual issues and to resolve them in a manner most favorable to the moving party, the petitioner herein. Petitioner states that the facts of the case below dictated that an evidentiary hearing be held to properly determine issues before the Court. To present his position, petitioner was present in Court and thru his trial counsel requested to testify. Such request was denied. The petitioner, being present, contends that it was an abuse of discretion of the Trial Court not

to allow petitioner to testify in light of his request to do so via his counsel's request for same. Such a denial, inter alia, effectively denies petitioner's right to due process and equal protection of the law as provided by the Constitution of the United States and the State of Ohio.

HOW A FEDERAL QUESTION AROSE

A Federal question of substantial importance arose upon the denial by the Supreme Court of Ohio to review the decision of the Court of Appeals for Hamilton County, Ohio. Such a denial works to deny the Petitioner his Constitutional right to due process and equal protection of the law.

ARGUMENT

1. The party against whom a Motion For Summary Judgment is made is entitled to have all depositions, answers to interrogatories, admissions of the genuiness of papers or documents and affidavits construed most strongly in his favor pursuant to Civil Rule 56(C), Ohio Rules of Civil Procedure. When a party has made an affidavit and his deposition has also been taken and the two in some way conflict, it is error for the court to exclude the affidavit from consideration in determining whether there is any genuine issue as to a material fact.

An essential issue in this case is whether the trial court properly applied the test for granting summary judgment in favor of the Respondent (Appellee below) and against Petitioner (Appellant below) and whether the Court of Appeals for the First Appellate District of Ohio and the Supreme Court of Ohio properly reviewed the lower court's application and subsequent Order. Rules 56 and 60 of the Ohio Rules

of Civil Procedure govern the manner in which summary judgment is to be determined. The Ohio Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure and are substantially similar in nature. Adomeit v. Baltimore, 39 Ohio App. 2d 97, 316 N.E. 2d 469 (1974).

A summary judgment is a judgment that can be rendered from an explanation of the pleadings and without a trial. While a motion for summary judgment is not a trial, but merely a proceeding to determine if there are triable issues of fact that require trial, still, when granted, the motion is the procedural equivalent of a trial, and great care must therefore be taken to insure that injustice does not result from its employment and that it does not become a substitute for the open trial method of determining facts. 73 Am. Jur. 2d, Summary Judgment, Section 1

at 722 (1974). A motion for summary judgment may be granted only if there is no dispute as to any material fact; the motion will be denied where the pleadings, affidavits and depositions indicate beyond a doubt that a jury case is presented. Petroff v. Commercial Motor Freight, Inc., 12 Ohio Op. 2d 484, 82 Ohio L. Abs. 433, 165 N.E. 2d 840 (1960).

The party moving for summary judgment has the burden of demonstrating that there is no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law. The movant is held to a stringent standard. Before summary judgment will be granted it must be clear what the truth is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. Sartor v. Arkansas Natural

Gas Corp., 321 U.S. 602, 64 S. Ct. 424, 88 L. Ed. 967 (1944); Poller v. Columbia Broadcasting, 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962).

The issue of material fact required to be present under the Ohio and Federal Rules of Civil Procedure 56(C) in order to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial. First National Bank v. Cities Service, 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968).

In ruling on a motion for summary judgment, all reasonable inferences from

the proofs offered are drawn against movant and viewed in the light most favorable to the party opposing the motion. United States v. Diebold, 369 U.S. 654, 82 S. Ct. 933, 8 L. Ed. 2d (1962).

Both parties to this action below engaged in extensive discovery proceedings prior to the summary judgment proceeding. At one point in the discovery phase, petitioner was deposed by respondent and questioned regarding the installation and maintenance of the machine which caused petitioner's injuries and for which recovery is sought. The following questions and answers appeared:

> Q. So you have no personal knowledge of who actually installed the machine and put it together when they received it from the manufacturer; is that correct?

A. No, I have no idea.

Q. And from the date of its purchase and installation until the date of your accident, do you know whether or not there were any changes or modifications to that machine?

A. Yes, there were modifications.

Attached to petitioner's motion to vacate summary judgment was an affidavit reciting, in part, the following facts:

> The machine that injured me in 1975 was originally installed in 1971. The top portion or the hopper was changed several times between 1971 and 1975 . . . The first two top portions or hoppers that were installed between 1971 and 1975 were modified by someone. However, the machine that injured me was never modified, it was a brand new machine . . .

Respondent has maintained throughout this case that modifications to the machine were not performed by respondent and, therefore, is not liable for claimed injuries due to a defect in the product. The affidavit of petitioner clearly states

that the portion of the machine manufactured by respondent which resulted in his injuries was not subject to any modification and, thus, respondent remains strictly liable.

Had the trial court viewed this evidence most strongly in petitioner's favor as dictated by Rule 56 of the Rules of Civil Procedure, there is no doubt but that the court would have concluded that there existed a genuine issue of material fact which demanded that summary judgment be denied the movant.

It would appear, however, that the trial court refused to even consider the contents of the affidavit, dismissing it simply because it appeared to be in conflict with appellant's prior testimony at deposition. Such disregard violates both the spirit and the letter of the

the summary judgment rule. "The remedy [summary jdugment] can be invoked only when complete absence of genuine fact issue appears on the face of the record. Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. All doubts upon the point must be resolved against the moving party..." Griffeth v. Utah Power and Light Co., 226 F. 2d 661, (9th Cir., 1955).

Additionally, the fact that the deposition appears in conflict with petitioner's affidavit subsequently submitted is an issue of credibility. It is well settled that it is outside the province of a summary judgment hearing to resolve issues of credibility. Sartor v. Arkansas Natural Gas Corp., supra, Duke v. Sanymetal Products Co., 31 Ohio App. 2d 78, 286 N.E. 2d 324 (1972).

> If at the hearing on a motion for summary judgment there is contradictory evidence. . . then an issue of credibility is raised, providing the contradictory or impeaching evidence is not too incredible to be believed by reasonable minds. When such a situation occurs, the court should not attempt to resolve any genuine issue as to credibility and the motion should be denied as movant has failed to establish the absence of any triable issue of material fact. Wilson v. Pollet, Supreme Court of Alaska, 416 P. 2d 381 (1966).

The deposition of a witness will usually be more reliable than his affidavit, since the deponent was either cross-examined by opposing counsel or at least available to opposing counsel for cross-examination. Nevertheless, if a witness has made an affidavit and his deposition has also been taken and the two in some way conflict, the court may not exclude the affidavit from consideration in the determination of the questions whether there is any genuine issue as to any

material fact. 6.2 Moore's Federal Practice Par. 56.22[1] at 1326 (2d ed. 1979); Perma Research and Development Co. v. The Singer Co., 410 F. 2d 572 (2nd Cir., 1962); Camerlin v. N.Y. Central Railroad Co., 199 F. 2d 698 (1st Cir., 1952).

Petitioner was present at the hearing on the motion to vacate summary judgment and requested through his attorney that he be allowed to testify in order to clarify the discrepency between deposition testimony and the statements contained in the affidavit. The situation was not one in which petitioner submitted an affidavit contradicting prior testimony simply to raise an issue of fact, but one in which a genuine issue existed and petitioner was attempting to present the issue to the court for consideration.

It is well settled that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party can not prevail under any circumstances. The trial court was charged with the duty of examining all evidence properly presented in a summary judgment proceeding in order to determine the existence of a material fact. The petitioner's affidavit, properly submitted, set forth evidence establishing the existence of a genuine issue of material fact. The trial court erred in denying petitioner's motion to vacate summary judgment since there were present significant issues of fact for a jury or trier of fact to consider.

2. Rule 56 of the Ohio Rules of Civil Procedure authorizes judgment only where the moving party is entitled to judgment as a matter of law and no genuine issue as to any material fact remains. The trial court violated petitioner's rights of fundamental due process guaranteed by the Fourteenth Amendment by, firstly, granting summary judgment and, secondly, by refusing to allow petitioner the opportunity to present facts at an evidentiary hearing on a motion to vacate summary judgment resulting in a denial of petitioner's motion and thereby refusing to allowpetitioner the right to have a jury or trier of facts resolve a disputed factual issue bearing significantly on the outcome of litigation.

The guarantee of due process found in the Fifth Amendment of the Constitution declares that no person shall "be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property without due process of law."

Due process requires, at a minimum, that, absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty

through the judicial process be given a meaningful opportunity to be heard. Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780, 28 L.Ed. 2d 113 (1971).

This Court has stated that due process requires that there be an opportunity to present every available defense. Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L. Ed. 2d 36 (1972) American Surety Co. v. Baldwin, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231 (1932).

The proceeding or hearing requisite to due process must be appropriate, fair, adequate and reasonable in each particular case. It requires an opportunity to be heard at a meaningful time and in a meaningful manner. A hearing which does not give the right to interpose reasonable and legitimate defenses cannot constitute due process.

Although an evidentiary hearing is not required under the Ohio or Federal Rules of Civil Procedure before summary judgment may

be granted, great care must be taken to insure that by refusing the opportunity to present evidence at a formal hearing the rights of the parties are not violated. It is contended by Petitioner that sufficient evidence was presented to the trial court by way of affidavit in order for the court to rule favorably on Petitioner's Motion to Vacate Summary Judgment, thereby allowing Petitioner the opportunity to have a jury or trier of facts resolve the disputed factual issue, as dictated under the principals of due process. In addition, Petitioner maintains that the provisions of due process as applied to summary judgment proceedings anticpate that a court will allow the party opposing summary judgment to present all evidence necessary to support his position under the governing rules of civil procedure.

As discussed above, summary judgment will be granted only if there is no dispute as to any material facts and that the movant

is entitled to judgment as a matter of law. Sartor, supra. Petitioner presented evidence before the trial court by way of affidavit and his counsel's oral presentation which clearly established the existence of a dispute as to a material fact. The due process provisions of the Constitution applicable to the states by operation of the Fourteenth Amendment demand that Petitioner be afforded the opportunity to have his case proceed to trial in order that a jury or trier of facts would resolve the disputed factual issues.

It must also be noted that Petitioner was present before the trial court during the hearing on the Petitioner's Motion to Vacate Summary Judgment and requested at that time to testify before the Court in order to more fully explain his contention as to disputed factual issues. Petitioner maintains that under the spirit of the summary judgment procedure and being mindful

of the requirements of due process, Petitioner should have been granted the opportunity to present every available defense before the Court.

The denial of Petitioner's request for an evidentiary hearing was violative of the rights guaranteed him by the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For these reasons it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Ohio.

Respectfully submitted,

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Counsel for Petitioner

September 12, 1981

APPENDIX A

Order of Supreme Court of Ohio Denying Cert

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, 1981 TERM
City of Columbus. To wit: March 18, 1981

David Bush, No. 81-237

Appellant,) MOTION FOR AN ORDER
vs.) DIRECTING THE COURT
) OF APPEALS
Cumberlin Engineering,) for Hamilton County
Appellee.) TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this 18th day of March, 1981

Thomas L. Startzman,
Clerk

APPENDIX B

Order of Supreme Court of Ohio Denying Rehearing

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, 1981 TERM

City of Columbus. To wit: April 15, 1981

David Bush, No. 81-237

Appellant,

vs. REHEARING

Cumberlin Engineering,

Appellee.

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.____ Page_____.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 15th day of April, 1981.

Thomas L. Startzman,

Clerk

APPENDIX C

OPINION OF COURT OF APPEALS

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

DAVID BUSH, : NO. C-790706

Plaintiff-Appellant, :

vs. : MEMORANDUM DECISION AND JUDGMENT ENTRY.

CUMBERLIN ENGINEERING, :

Defendant-Appellee. :

Messrs. Bowman and Swillinger, Gary V. Bowman, of counsel, 500 Provident Bank Building, 632 Vine Street, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Messrs. Rendigs, Fry, Kiely & Dennis, Joseph W. Gelwicks, of counsel, 907 Central Trust Tower, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas, Hamilton County, Ohio, the transcript of the proceedings, the briefs and the arguments of counsel.

Now, therefore, the assignment of error having been fully considered is accordingly passed upon in conformity with App. R. 12(A) as follows:

Appellant commenced an action in the court below seeking to recover for certain personal injuries received while employed by Monsanto Chemical Company and injured while working on a machine manufactured by defendant-appellee Cumberlin Engineering. The appellee herein was joined as a party-defendant in the amended complaint filed in September of 1976. The trial court granted appellee's motion for summary judgment on October 20, 1978. On may 2, 1979 appellant filed a motion to vacate that judgment, which was promptly denied on May 4, 1979. The appellant filed a second motion to vacate the judgment on July 26, 1979, accompanied by depositions and the appellant's affidavit. Thereafter, upon oral argument, the trial court overruled the motion to

vacate judgment on August 24, 1979, and it is from that order of the trial court that appellant brings his appeal.

Appellant, for his single assignment of error, complains that the court below erred in refusing to grant appellant's motion to vacate the summary judgment previously entered.

Appellant apparently cast his motion to vacate within the framework of Civ. R. 60(B). In order to obtain relief under Civ. R. 60(B), the movant, in addition to filing his motion as provided for in Civ. R. 7(B), may also file memoranda, affidavits, depositions and any other relevant evidentiary material which exemplify operative facts demonstrating the timeliness of the motion, here conceded by the appellee, reasons for seeking relief, and that the movant is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5).

The movant has the burden of showing his entitlement to relief. Whether or not the motion is granted is discretionary with the trial court. In the absence of a clear showing of abuse of discretion, the decision of the trial court will not be disturbed on appeal.

Appellant attached his affidavit to the motion to vacate the judgment. As we read appellant's affidavit, it is at best contradictory. For example, appellant said:

> The machine that injured me in 1975 was originally installed in 1971. The top portion or the hopper was changed sev eral times between 1971 and 1975. . . .The first two top portions or hoppers that were installed between 1971 and 1975 were modified by someone. However, the machine that injured me was never modified, it was a brand new machine. . . .

Appellant's deposition was taken by the appellee, as if on cross-examination. At page 31 of that deposition, the following questions and answers appeared:

Q. So you have no personal knowledge of who actually installed the machine and put it together when they received it from the manufacturer; is that correct?

A. No, I have no idea.

Q. And from the date of its purchase and installation until the date of your accident, do you know whether or not there were any changes or modifications to that machine?

A. Yes, there were modifications.

One the one hand the appellant seems to be saying that there were modifications made on the machine which he was operating at the time of the injury. In his affidavit he appears to say that the machine which injured him was never modified. It is the well established rule in this jurisdiction that when a litigant gives testimony he is bound by his statements and cannot later contradict himself. Baker v. Houston Bros. Waterproofing Inc., No. C-78-05-0041 (1st Dist. July 18, 1979) (citing and following Winkler v. City of Columbus (1948), 149 Ohio St. 39, 77 N.E.2d 461).

From the record before us, the appellant has failed to clearly show an abuse of discretion on the part of the trial court and, as a consequence, that court's order will not be disturbed. The assignment of error is without merit.

The assignment of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Order that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

SHANNON, P. J., KEEFE and CASTLE, J. J.

APPENDIX D

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

CONSITUTION OF THE STATE OF OHIO

ARTICLE I, SEC. 2

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

APPENDIX G

CONSTITUTION OF THE STATE OF OHIO

ARTICLE II, SEC. 26

All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to publish schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution.

APPENDIX H

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I, SEC. 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

APPENDIX I

CIVIL RULE 56(A), (B), (C), (E), OHIO RULES OF CIVIL PROCEDURE

RULE 56. Summary Judgment

(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counter-claim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. However, if the action has been set for pretrial, a motion for summary judgment may be made only with leave of court. If the action has been set for trial, a motion for summary judgment may be made only with the consent of all parties.

(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. However, if the action has been set for pretrial, a motion for summary judgment may be made only with leave of court. If the action has been set for trial, a motion for summary judgment may be made only with the consent of all parties.

(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing

may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositiions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show there there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings,

APPENDIX J

CIVIL RULE 60 (B), OHIO RULES OF CIVIL PROCEDURE

(B) Mistakes; inadvertence; excusable neglect, newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 9 1981
STEVAS
CLERK

No. 81-502

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DAVID BUSH,

Petitioner,

vs.

CUMBERLIN ENGINEERING,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does Civil Rule 60 of the Ohio Rules of Court violate the due process and equal protection guarantees of the Fifth and Fourteenth Amendments to the Constitution of the United States by not requiring an evidentiary hearing before the trial court?

2. Is a litigant denied due process and equal protection afforded under the Fifth and Fourteenth Amendments of the Constitution of the United States when a trial court excludes from consideration an affidavit of said litigant which contradicts previous deposition testimony of that litigant?

INDEX

	Page
QUESTIONS PRESENTED FOR REVIEW	1
INDEX	III
TABLE OF AUTHORITIES	IV
STATEMENT OF THE CASE	1
ARGUMENT	4
1. Does Civil Rule 60 of the Ohio Rules of Court violate the due process and equal protection guarantees of the Fifth and Fourteenth Amendments of the Constitution of the United States by not requiring an evidentiary hearing before the Trial Court?	4
2. Is a litigant denied due process and equal protection afforded under the Fifth and Fourteenth Amendments of the Constitution of the United States when a Trial Court excludes from consideration an affidavit of said litigant which contradicts previous deposition testimony of that litigant?	6
CONCLUSION	7

TABLE OF AUTHORITIES

	Page
Camerlin v. New York Central Railroad Co., 199 F.2d 698 (1st Cir., 1952)	7
GTE Automatic Electric, Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146 (1976)	5
Perma Research and Development Co. v. The Singer Co., 410 F.2d 572 (2nd Cir., 1969)	7
Temple v. Wean, 50 Ohio St.2d 317 (1977)	4

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STATEMENT OF THE CASE

The procedural history of this case is that Petitioner commenced the within action to recover for certain alleged personal injuries while Petitioner was at work as a chemical operator in the course and scope of his employment for Monsanto Chemical Company. The Complaint was filed on June 24, 1976, in the Court of Common Pleas, Hamilton County, Ohio, and alleged injuries were sustained as a result of a defective product on the premises of Petitioner's employer, said product being a machine that ground scrap plastic, frequently referred to as a chunk grinder. The Complaint was directed against one defendant not a party to this appeal. Thereafter, in September of 1976 an

Amended Complaint was filed joining as an additional defendant the Respondent herein, Cumberlin Engineering.

Once the matter was at issue Respondent filed answers to Interrogatories propounded to it by Petitioner, and then the deposition of Petitioner was taken and filed with the Trial Court.

The Motion for Summary Judgment on behalf of Respondent Cumberlin Engineering was filed on September 15, 1978. Upon oral argument of counsel the Trial Court granted Respondent's Motion for Summary Judgment on October 20, 1978.

After this judgment was filed Petitioner, by way of subpoena, pursued discovery by subpoenaing for deposition certain employees of Monsanto Company. Thereafter, on May 2, 1979 a Motion to Vacate the Judgment was filed by Petitioner, and promptly overruled by the Court on May 4, 1979, without oral argument of counsel.

On July 26, 1979 Petitioner filed a second Motion to Vacate Judgment under Rule 60. In response Respondent filed a Motion to Strike the Affidavit of Petitioner Bush, attached to Petitioner's Motion to Vacate Judgment. Additionally, the four depositions taken by Petitioner after the final Order referable to the summary judgment were all filed by Respondent with the Court. Then, upon oral argument of counsel in chambers and further oral argument of counsel in open court on the record with the Petitioner himself present, the Court on August 24, 1979 overruled Petitioner's Motion to Vacate Judgment. Thereafter, Petitioner pursued the matter to the First District Court of Appeals, which sustained the Trial Court's overruling the Motion to Vacate Judgment. The Supreme Court of Ohio refused to grant Petitioner's request for jurisdiction. Thereupon, Petitioner sought a writ of certiorari from this Court.

The facts may be summarized as follows. The within action was commenced by Petitioner David W. Bush to recover for certain alleged personal injuries claimed to have been sustained on July 28, 1975, while he was an employee working within the course and scope of his employment at Monsanto Chemical Company. At the time of the alleged incident Petitioner was working with a granulating machine manufactured by Respondent Cumberlin Engineering. The purpose of the machine was to grind up chunks of plastic.

At the time Petitioner was operating the machine there was a conveyor belt attached to the opening, called a chute, located on the top of the grinder. Petitioner was placing the plastic chunks on the moving conveyor belt, and these chunks were thus fed into the grinder. At the time Petitioner was allegedly injured, a chunk of plastic had become lodged in the flap located at the mouth of the chute. In attempting to free the chunk of plastic Petitioner was poking it with a large metal bar, which became stuck and subsequently swung sideways striking Petitioner in the side of the face.

Respondent Cumberlin Engineering manufactured the grinder and supplied it to Monsanto in 1971. The date of the alleged occurrence was July 28, 1975.

During this four year interval substantial modifications were made to the grinder. On deposition Petitioner candidly admitted that the entire upper portion of the machine in question, including the chute and the metal flap involved in the accident, were substantially modified two different times prior to the date of Petitioner's alleged injury. It is undisputed in the record that the manufacturer, Respondent Cumberlin Engineering, did not make those modifications. This testimony is supported by

several Monsanto employees who testified pursuant to subpoena, that there was a continual series of minor changes and two major modifications to the machine as to the chute area, between 1971 and the date of the occurrence. Additionally, these changes were made by Monsanto Company employees and made solely to increase the rate of production and not because the machine was defective or unsafe to operate. It should be noted that the depositions of the various Monsanto employees were taken by Petitioner after the summary judgment had become "final", but Petitioner never filed any of these deposition transcripts. Respondent filed these transcripts. Petitioner merely filed his own affidavit which contradicted his deposition testimony previously filed with the Trial Court in this action.

ARGUMENT

1. Does Civil Rule 60 of the Ohio Rules of Court violate the due process and equal protection guarantees of the Fifth and Fourteenth Amendments of the Constitution of the United States by not requiring an evidentiary hearing before the Trial Court?

Summary judgment was granted Respondent on October 20, 1978. The basis of the Trial Court's ruling was the affirmative showing that the substantial modifications to the machine occurred subsequent to the manufacturer's relinquishment of the machine to the user. *Temple* v. *Wean*, 50 Ohio St.2d 317 (1977). Petitioner did not perfect any appeal from the Trial Court's ruling. Seven months later Petitioner attempted to revive the litigation in the Trial Court by relying on Ohio Civil Rule 60, Relief from Judgment. Ohio Rule 60 is identical to Federal Rule 60 in all pertinent particulars, and neither rule requires

or even makes mention of an evidentiary hearing in conjunction with the motion. Implicit in the statement "upon such terms as are just" it would appear that any such hearing is within the sound discretion of the Court.

Petitioner sets forth no precedent that would hold either the Ohio or the Federal Rule 60 in violation of the due process and equal protection clauses absent in evidentiary hearing. The reason is simply no such precedent exists.

To prevail on his motion under Rule 60, Petitioner must demonstrate, among other things, he has a meritorious claim to present if the relief is granted; he is entitled to relief under one of the grounds stated in Rule 60 (D) (1) through (5); and, the motion is timely made. *GTE Automatic Electric, Inc.* v. *ARC Industries, Inc.*, 47 Ohio St. 2d 146 (1976). Petitioner has not even addressed these issues either before this Court or in the two appellate courts that previously passed on his claims.

Additionally, the decision to grant a Motion to Vacate Judgment under Rule 60 is discretionary with the Court, and Petitioner has the burden of establishing by clear and convincing evidence the Trial Court abused its discretion in overruling the Motion to Vacate Judgment. *GTE Automatic Electric, Inc.* v. *ARC Industries, Inc.*, supra. Again, Petitioner has not even addressed this issue in the various appellate levels nor was the issue addressed in the Brief filed before this Court.

Therefore, Petitioner has addressed none of the issues that must necessarily be considered in pursuing the remedies set forth in Rule 60. The alleged constitutional issues now raised in this Court were never addressed nor even mentioned by Petitioner in the two appellate levels through which this litigation has now passed. He seeks now to avoid the operation of the law by having it declared uncon-

stitutional. This Court is strongly urged to reject such an attempt.

2. Is a litigant denied due process and equal protection afforded under the Fifth and Fourteenth Amendments of the Constitution of the United States when a trial court excludes from consideration an affidavit of said litigant which contradicts previous deposition testimony of that litigant?

Petitioner claims he was denied due process and equal protection of the law due to the Trial Court's excluding his affidavit from consideration. It should be remembered that the deposition of Petitioner was filed with the Court on September 15, 1978, and formed the basis for Respondent's Motion for Summary Judgment. The motion was granted a month later. Some nine months thereafter Petitioner filed his affidavit. During the interim Petitioner had taken the depositions of four witnesses, by subpoena, after the original judgment had long since become final. All of this deposition testimony supported Petitioner's deposition testimony regarding the substantial modifications to the machine in question. Obviously, Petitioner did not file these deposition transcripts, Respondent did. In July of 1979, a second attempt was made to vacate the judgment and in conjunction with that second attempt the so called affidavit was filed.

As indicated in our argument above in the first question, the matters under Rule 60 are largely discretionary with the Trial Court. Again it should be pointed out that Petitioner presents no precedent to support their contention that the Trial Court was duty bound to accept a contradictory affidavit so that the same party may create a "question of fact."

It is noteworthy that the two cases cited by Petitioner in his Brief pointedly recognized that a refusal by the Trial Court to consider such an affidavit is not prejudical error, to say nothing of a violation of due process. *Camerlin* v. *New York Central Railroad Co.*, 199 F.2d 698 (1st Cir., 1952), states at page 702: "However, *if* there was error in this respect, it was not prejudicial." (Italics Added)

Perma Research and Development Co. v. *The Singer Co.*, 410 F.2d 572 (2nd Cir., 1969) specifically recognizes Respondent's position in this regard. That court stated, at page 578:

> If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

A more appropriate quotation applicable to this case could not be found.

CONCLUSION

Based on the foregoing it is respectfully submitted that a writ of certiorari be denied Petitioner herein.

Respectfully submitted,

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